ASSUMPSIT FOR USE AND OCCUPATION.

IN an essay on the History of Assumpsit in the current volume of the REVIEW it is stated (p. 65) that *Indebitatus Assumpsit* for use and occupation was not allowed upon a quasi-contract, for special reasons connected with the nature of rent. To set forth briefly these reasons is the object of this *excursus.*

It is instructive to compare a lease for years, reserving a rent, with a sale of goods. In both cases, debt was originally the exclusive action for the recovery of the amount due. In neither case was the duty to pay conceived of as arising from a contract in the modern sense of the term. Debt for goods sold was a grant. Debt for rent was a reservation. About the middle of the sixteenth century *Assumpsit* was allowed upon an express promise to pay a precedent debt for goods sold; and in 1602 it was decided by Slade's case that the buyer's words of agreement, which had before operated only as a grant, imported also a promise, so that the seller might, without more, sue in Debt or *Assumpsit*, at his option.[1]

Neither of these steps was taken by the courts in the case of rent. There is but one reported case of a successful *Indebitatus Assumpsit* for rent before the Statute 11 Geo. II. c. 19, § 14; and in that case the reporter adds: "Note, there was not any exception taken, that the *assumpsit* is to pay a sum for rent; which is a real and special duty, as strong as upon a specialty; and in such case this action lies not, without some other special cause of promise."[2] This note is confirmed by several cases in which the plaintiff failed upon such a count as well when there was subsequent express promise[3] as where there was no such promise.[4]

The chief motive for making *Assumpsit* concurrent with Debt for goods sold was the desire to evade the defendant's wager of law. This motive was wanting in the case of rent, for in debt for

[1] *Supra*, 54–56.

[2] Slack *v.* Bowsal (B. R. 1623), Cro. Jac. 668.

[3] Green *v.* Harrington (C. B. 1619), 1 Roll. Ab. 8, pl. 5, Hob. 24, Hutt. 34, Brownl. 14, S. C.; Munday *v.* Baily (B. R. 1647), Al. 29, Anon. Sty. 53, S. C.; Ayre *v.* Sils (B. R. 1648), Sty. 131; Shuttleworth *v.* Garrett (B. R. 1688), Comb. 151, per Holt, C. J.

[4] Reade *v.* Johnson (C. B. 1591), Cro. El. 242, 1 Leon. 155, S. C.; Neck *v.* Gubb (B. R. 1617), 1 Vin. Ab. 271, pl. 1, 2; Brett *v.* Read (B. R. 1634), Cro. Car. 343, W. Jones, 329, S. C.

rent wager of law was not permitted.[1] Again, although *Assumpsit* was the only remedy against the executor of a buyer or borrower, the executor of a lessee was chargeable in debt. These two facts seem amply to explain the refusal of the courts to allow an *Indebitatus Assumpsit* for rent.

But although the landlord was not permitted to proceed upon an *Indebitatus Assumpsit*, he acquired, after a time, the right to sue in certain cases, in special assumpsit, as well as in debt. This innovation originated in the King's Bench, which, having no jurisdiction by original writ in cases of debt, was naturally inclined to extend the scope of trespass on the case, of which *Assumpsit* was a branch. At first this court attempted to justify itself by construing certain agreements as not creating a rent. For example, in Symcock *v.* Payn,[2] the plaintiff declared that "in consideration that the plaintiff had let to the defendant certain land, the defendant promised to pay *pro firma prædicta terræ* at the year's end, £20." "All the court (*absente* Popham) held that the action was maintainable; for it is not a rent, but a sum in gross; for which he making a promise to pay it in consideration of the lease the action lies."[3] This judgment was reversed in the Exchequer Chamber in accordance with earlier and later cases in the Common Bench.[4]

In the reign of Charles I. the rule was established in the King's Bench that *Assumpsit* would lie concurrently with Debt, if, at the time of the lease, the lessee expressly promised to pay the rent. Acton *v.* Symonds[5] (1634) was the decisive case. The count was upon the defendant's promise to pay the rent in consideration that the plaintiff would demise a house to him for three years at a rent of £25 per annum. The court (except Croke, J.) agreed that if a lease for years be made rendering rent, an action on the case lies not upon the contract, as it would upon a personal contract for sale of a horse or other goods, but where there is an *assumpsit* in fact, besides the contract on the lease, an action on this assumpsit is maintainable. In the report in Rolle's Abridgment it is said: "The action lay, because it appeared that it was intended by the parties that a lease should be made and a rent reserved, and for

[1] Reade *v.* Johnson, 1 Leon. 155; London *v.* Wood, 12 Mod. 669, 681.

[2] Cro. El. 756, Winch. 15, s. c. cited (1621).

[3] See also Neck *v.* Gubb (1617), 1 Vin. Ab. 271, pl. 3; Dartnal *v.* Morgan (1620), Cro. Jac. 598.

[4] Clerk *v.* Palady (1598), Cro. El. 859; White *v.* Shorte (1614), 1 Roll. Ab. 7, pl. 4; Ablain's Case (1621), Winch, 15.

[5] W. Jones, 364, Cro. Car. 414, 1 Roll. Ab. 8, pl. 10, s. c.

better security of payment thereof that the lessor should have his remedy by action of debt upon the reservation, or action upon this collateral promise at his election, and this being the intent at the beginning, the making of the lease, though real, would not toll this collateral promise, as a man may covenant to accept a lease at a certain rent and to pay the rent according to the reservation, for they are two things, and so the promise of payment is a thing collateral to the reservation, which will continue though the lessee assign over." This doctrine was repeatedly recognized in the King's Bench ;[1] it was adopted in the Exchequer in 1664;[2] and was finally admitted by the Common Bench in Johnson *v.* May[3] (1683), where, "because this had been *vexata quæstio* the court took time to deliver their opinion, . . . and all four justices agreed that the action lay, for an express promise shall be intended, and not a bare promise in law arising upon the contract, which all agree will not lie."

In the cases thus far considered the *assumpsit* was for the payment of a sum certain. *Assumpsit* was also admissible where the amount to be recovered was uncertain; namely, where the defendant promised to pay a reasonable compensation for the use and occupation of land. Indeed, in such a case *Assumpsit* was the sole remedy, since Debt would not lie for a *quantum meruit*.[4]

Such was the state of the law when the Statute 11 Geo. II. c. 19, § 14, was passed, which reads as follows: "To obviate some difficulties that may at times occur in the recovery of rents, where demises are not by deed, it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, and hereditaments held or occupied by the defendant in an action on the case for the use and occupation of what was so held and enjoyed; and if, in evi-

[1] Potter *v.* Fletcher (1633), 1 Roll. Ab. 8, pl. 7; Rowncevall *v.* Lane (1633), 1 Roll. Ab. 8, pl. 8; Luther *v.* Malyn (1638), 1 Roll. Ab. 9, pl. 11; Note (1653), Sty. 400; Lance *v.* Blackman (1655), Sty. 463; How *v.* Norton (1666), 1 Sid. 279; 2 Keb. 8, 1 Lev. 279, s. c.; Chapman *v.* Southwick (1667), 1 Lev. 204, 1 Sid. 323, 2 Keb. 182, s. c.; Freeman *v.* Bowman (1667), 2 Keb. 291; Stroud *v.* Hopkins (1674), 3 Keb. 357. See also Falhers *v.* Corbret (1733), 2 Barnard. 386, but note the error of the reporter in calling the case an *Indebitatus Assumpsit.*

[2] Trever *v.* Roberts, Hard. 366.

[3] 3 Lev. 150.

[4] Mason *v.* Welland (1685), Skin. 238, 242, 3 Mod. 73, s. c.; How *v.* Norton (1666), 1 Lev. 179, 2 Keb. 8, 1 Sid. 279, s. c. It is probable that a promise implied in fact was sufficient to support an *assumpsit* upon a *quantum meruit.* "It was allowed that an *assumpsit* lies for the value of shops hired without an express promise," per Holt, C. J. (1701), 1 Com. Dig., *assumpsit*, C, pl. 6.

dence on the trial of such action, any *parol* demise or agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of damages to be recovered."

The "difficulties" here referred to would seem to be two. If, before this statute, the plaintiff counted upon a *quantum meruit*, and the evidence disclosed a demise for a sum certain, he would be nonsuited for a variance. Secondly, if he declared for a sum certain, he must, as we have seen, prove an express promise at the time of the demise. The statute accomplished its purpose in both respects. But it is in the removal of the second of the difficulties mentioned that we find its chief significance. Thereby *Indebitatus Assumpsit* became concurrent with Debt upon all *parol* demises. In other words, the statute gave to the landlord, in 1738, what Slade's case gave to the seller of goods, the lender of money, or the employee, in 1602; namely, the right to sue in *Assumpsit* as well as in Debt, without proof of an independent express promise.

The other counts in *Indebitatus Assumpsit* being the creation of the courts, the judges found no great difficulty in gradually enlarging their scope, so as to include quasi-contracts, where the promise declared upon was a pure fiction. Thus, one who took another's money, by fraud or trespass, was liable upon a count for money had and received;[1] one who wrongfully compelled the plaintiff's servant to labor for him, was chargeable in *Assumpsit* for work and labor;[2] and one who converted the plaintiff's goods, must pay their value in an action for goods sold and delivered.[3]

But *Indebitatus Assumpsit* for rent being of statutory origin, the courts could not, without too palpable a usurpation, extend the count to cases not within the act of Parliament. The statute was plainly confined to cases where, by mutual agreement, the occupier of land was to pay either a defined or a reasonable compensation to the owner. Hence the impossibility of charging a trespasser in *assumpsit* for use and occupation.

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[1] *Supra*, 67; Thomas *v.* Whip, Bull. N. P. 130; Tryon *v.* Baker, 7 Lans. 511, 514.

[2] *Supra*, 68; Stockell *v.* Watkins, 2 Gill & J. 326.

[3] The writer is indebted to Professor Keener for a correction of the statement (*supra*, 68) that the count for goods sold and delivered was never allowed against a converter. See 2 Keener, Cases on Quasi-Contracts, 606, 607, n. 1; Cooley, Torts (2 ed.), 109, 110; Pomeroy, Remedies (2 ed.), §§ 568, 569.